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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 556

UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

WHITE OAK COAL COMPANY, INC., *Respondent*

BRIEF OF RESPONDENT

In Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Should a judgment for damages awarded under Section 303 of the Labor Management Relations Act be reversed because the District Court admitted evidence of, and the Court of Appeals considered as a "form of influence" violative of the Act, violence occurring at other mines, which was in addition to evidence that the union "induced and encouraged em-

ployees of a secondary employer to engage in a concerted refusal, in the course of their employment, to transport or handle coal produced by (respondent) and that one of the objectives of such action on the part of the Union was to force the secondary employees to quit the work of carrying (respondent's) coal or to force (respondent) to bargain with the Union as such representative of its employees"?

2. Is a jury verdict of labor union responsibility and a judgment for damages based thereon proper in an action under Section 303 of the Labor Management Relations Act of 1947 and the law of the State of Tennessee, where such responsibility was based in part upon the conduct of union members or of unnamed persons and not entirely on conduct of acknowledged agents or employees of the union?

3. In a suit for damages under state law by an employer against a labor union, is a court empowered, notwithstanding the principles of federal pre-emption, to render judgment against the union for compensatory damages based upon the total loss sustained by the employer, and for punitive damages, on account of violence and disorder for which the union is held responsible occurring during its course, where it affirmatively appears that a majority of the plaintiff's employees were members of the union and that the employer's inability to operate and the consequent losses were the result of union activity having among its objectives the forcing of plaintiff to sign a union contract?

4. In an action for damages against a labor union in which plaintiff contends that certain acts which occurred during a labor dispute constituted violations

of Section 303 of the Act and that the union's entire course of conduct during the dispute also constituted wrongful interference with plaintiff's business in violation of state common and statute law, did the District Court have jurisdiction to determine liability under the common law or non-Federal grounds asserted in support of the single cause of action?

STATEMENT OF THE CASE

Kind of Action and Judgment

This is an action for damages to the coal mining business and property of White Oak Coal Company[1] against the United Mine Workers whose conduct is alleged to have been unlawful under Section 303 of the Labor Management Relations Act and under the common law and statutory law of Tennessee.

The jury, by its verdict in the form of answers to four separate questions found that the defendant or persons for whose actions it was legally responsible engaged in activities which damaged White Oak's business in violation of the Labor Management Relations Act and unlawfully interfered with or damaged plaintiff's business or property in violation of the applicable state law, that the amount of damages sustained was $185,000.00 and that the unlawful acts in violation of the state law having been done wantonly or with malice, White Oak should be allowed punitive damages in the amount of $200,000.00 (R. 26). Judgment was entered accordingly (R. 27) and subsequently the District Court overruled UMW's motion for judgment n.o.v. However, being of the opinion that the verdict as to punitive damages was excessive, the District

[1] The terminology used herein with reference to the parties will be the same as that used in the petition.

Court ordered a new trial unless White Oak accepted a remittitur of $75,000.00 (R. 41-43). The remittitur was accepted and UMW appealed (R. 44). On May 24, 1963, the Court of Appeals for the Sixth Circuit affirmed, and on petition to rehear changed a sentence in its opinion for purposes of clarification and denied the petition to rehear (A. 28).

The Facts

The facts of this case are extensively set forth in the opinion of the Court of Appeals; and since UMW on this appeal does not argue that any of the statements of fact appearing in the opinion are not supported by the record and does not present questions involving any particular factual situation but only a broad attack on the sufficiency of the proof generally, there appears to be no need for an additional statement of the material facts. However, in view of the petitioner's contentions that the Court of Appeals overlooked or failed to consider or did not point out certain additional testimony related to particular matters and in view of the fragmentary nature of the factual summary contained in the petition, amplifications and explanations of the Court's factual statements are appropriate and will be made in the argument concerning the questions to which such facts are related. Otherwise, respondent adopts the statement of facts contained in the opinion of the Court of Appeals.

SUMMARY OF ARGUMENT

The issues of the liability of UMW under Section 303 of the Labor Management Relations Act and under the law of Tennessee were properly submitted to the jury, there being ample evidence of unlawful secondary boycott and of interrelated violations of the law

of Tennessee on the part of persons acting as authorized agents on behalf of UMW, with or without the testimony concerning violence occurring contemporaneously at other nearby mines. The two questions presented for review by the petition in regard to the liability of UMW raise no real question of substantive law or procedure but a re-argument of the asserted insufficiency of the plaintiff's evidence and an appeal for further consideration of the defendant's evidence in conflict therewith.

The principle of federal pre-emption of the field of labor relations announced in previous decisions of this Court does not remove from the jurisdiction of the United States District Court an action such as this for damage caused by union activity which was unlawful under both federal and state law, was characterized by violence and was initially referred to and enjoined by the National Labor Relations Board.

ARGUMENT

QUESTION NO. 1

The Court of Appeals Sustained the Award of Damages for Violation of Section 303 of the Labor Management Relations Act Not Merely Upon Spectacular Violence Involving Mining Operations of Other Employers But Upon Clear Proof of the Occurrence of Prohibited Activity Interrupting the Transportation of Coal Produced by Respondent

In presenting the question of liability of UMW for violation of Section 303 of the Labor-Management Relations Act, the petitioner has undertaken to transform a question of fact into a question of law by misconstruing both the holding of the Court of Appeals as to the evidentiary basis of the liability and a sentence in the opinion concerning the legal significance of the priority in time of certain activity. The super-

ficial plausibility of the petitioner's argument arises from the interposition by the Court of Appeals, in the paragraph holding that certain interferences with truck drivers constituted a secondary boycott, of language from opinions in previous cases dealing with the relevancy to the issue of liability of evidence of violence occurring at other mines, which question was also raised in this case.

Specifically in response to the argument on behalf of UMW that there was no evidence to support a finding of violation of Section 303, the Court of Appeals in clear statute-related language held:

> "There was evidence that the union, by off-the-site picketing and other activities, induced and encouraged the employees of a secondary employer to engage in a concerted refusal, in the course of their employment, to transport or handle *coal produced by appellee*, and that one of the objectives of such action on the part of the Union was to force the secondary employees to quit the work of carrying *appellee's coal*, or to force *appellee* to bargain with the Union as the representative of its employees." (A. 11) (Italics supplied)

The facts upon which this holding as to liability for the inducement of truck drivers hauling coal from White Oak's operation before the commencement of picketing directed against respondent's own employees are set forth earlier in the opinion (A. 6).

After the above-quoted holding, the opinion of the Court of Appeals proceeds with a quotation from *Flame Coal Company* v. *United Mine Workers of America*, 303 F. 2d 39, 43 (C.A. 6) (cert. denied 371 U.S. 891), and language taken from *United Mine Workers of America* v. *Osborne Mining Company*, 279

F. 2d 716, 725 (C.A. 6) (cert. denied 364 U.S. 881), holding that evidence of violence occurring contemporaneously at other mines in the area is competent as constituting an illegal "form of influence and persuasion". There follows a simple statement that such evidence of violence occurring at other places was admissible. Then the Court, obviously referring again to the interference with truck drivers hauling White Oak coal, added a statement addressed to the contention of UMW that such interference with the truck drivers was a part of the Union's primary picketing effort directed against White Oak's own employees. This is the sentence that was changed upon petition to rehear and is the one misconstrued by petitioner as will be hereinafter noted.

In view of the extended argument of UMW about the evidence of violence at other places, the background of the controversy over this testimony should be considered. In the Court of Appeals UMW argued, under its Question No. 6, that the District Court committed reversible error "in admitting in evidence a mass of testimony concerning unrelated incidents of violence and threats of violence which occurred in 1959". By Question No. 5, complaint was made of the admission of evidence of events which took place in 1955 and 1956, and this subject is taken care of by the Court of Appeals later in the opinion (A. 23-26). It is to Question No. 6 as to the admissibility of evidence of the 1959 incidents that the quotations from the *Flame* and *Osborne* cases are addressed.

This evidence of events taking place at other mines in the area was introduced on behalf of White Oak as relevant on several grounds, only one of which was that such events influenced the conduct and the decisions of White Oak management, its employees and

the employees of employers doing business with White Oak and explained their subsequent conduct. UMW's acknowledged representatives, Prater, Daniel or Maddux, having been identified with most of the events, evidence thereof was also urged as admissible on the ground that it revealed UMW participation in the intensive and often violent campaign against coal producers, truckers and other persons, thus showing a common design or scheme of which similar activity of unnamed persons directed at White Oak and persons doing business with it was a part. This ground is noticed later in the opinion of the Court of Appeals after the Court dealt at some length with the admissibility of evidence of the two events that took place in 1955 (A. 264).

In this connection response should be made to one of the comments of UMW impugning the factual statements in the opinion of the Court of Appeals. It is said on page 14 of the petition that the Court of Appeals approved the introduction of evidence of the beating of a non-union operator in 1955 "notwithstanding the absence of UMW representatives or of a then current union dispute with that operator". The operator, Van Huss, testified that several months before the occurrence UMW Representative Ed Daniel had visited his mine and tried unsuccessfully to get him to sign a UMW contract and that one of the men in the mob involved in the beating incident referred to this fact (R. 262-264). Tom Taylor, one of those present, was president of a local UMW union and not a field representative of the international as were Daniel and Prater, but it was certainly proper for the jury to infer that he was acting in behalf of UMW in 1955 and 1959. In the 1959 campaign he helped

Prater close down the Gilchrist operation (R. 282-283); and along with Prater made threatening speeches to White Oak union members during the summer about the rival union (R. 207, 378, 411).

Although UMW does not question the *admissibility* of the evidence of the 1959 "spectacular violence" in this court as it did in the Court of Appeals, it should be pointed out that such activity, as contrasted with the more conventional means used by a labor union in formulating and negotiating a change in a collective bargaining contract, was effective to, and undoubtedly intended to, influence and induce action or inaction on the part of not only the primary employer but those seeking to do business with him. The word "spectacular" means "unusual display" and this characteristic of the UMW campaign was, indeed, significant. It represented more than a mere hope that employees other than coal miners would stay off the roads. Truck driver Eddie Ray Franklin quit hauling coal from the B. G. Arnold mine when the lights of the cars in the motorcade were blinked on and off at him (R. 322); truck drivers Ben West and E. H. Harris quit hauling coal from other mines when the trucks they were driving were shot up at different times and places on highway 25-W (R. 383-385, 401); Spradlin quit hauling coal when dynamite was exploded in his front yard at night (R. 392). White Oak could not get truckers to resume the hauling of coal from the strip pits to the tipples, which was indispensable to the operation, and employer Alexander testified that the reason he quit furnishing trucks was that he and his drivers were scared (R. 94, 345, 367). The drivers of employer Snyder, who was buying coal at the White Oak tipples and hauling it to his yards at Knoxville,

quit because they were stopped and threatened and also undoubtedly because of what was happening to others (R. 146, 365). There is no identification of the people who shot at the truck drivers, but UMW members and acknowledged agents were connected with other instances of interferences with and intimidation of truck drivers during the same period of time and with the same effect; and for the reasons stated and under the authorities cited by the Court of Appeals such evidence was properly admitted.

Whether or not the "spectacular violence" at other mines was the only conduct that could be considered violative of Section 303 in the *Flame* case from which the phrase was quoted, there was certainly in this case interference with the truckers hauling White Oak's coal that clearly amounted to a secondary boycott. The tactics were the same as those shown in the case of *Allen* v. *United Mine Workers of America*, 319 F. 2d 594 (C.A. 6), involving coal truckers in an adjoining Tennessee county. In that case and in this UMW representatives, agents and members aggressively went after the truck drivers and intentionally forced them to cease hauling non-union coal. As stated, the employers who ceased doing business with White Oak did so not only because, as UMW here contends, they heard about violence involving other people, but also and mainly because their truck drivers were, themselves, threatened and intimidated and quit work, as found by the Court of Appeals.

To eliminate from consideration evidence of such interferences with the hauling of coal and the above-quoted holding of the Court of Appeals as a basis of liability under Section 303, petitioner argues that the effect of the change in the sentence of the opinion

upon rehearing, above referred to, was a holding that this first interference with the trucking of White Oak's coal was legally permissible as incidental to *subsequent* primary activity. This contention is set forth first in the statement of the case on page 6 of the petition and is repeatedly argued in an effort to isolate "spectacular violence" as the only basis for a finding of liability under the federal law. It makes no sense whatever.

A brief explanation of the history of this question in this litigation is also worthy of consideration. In its briefs in the Court of Appeals petitioner took the position that the stopping of the truck drivers hauling coal purchased by their employer from White Oak's Anthras tipple was a part of primary picketing necessarily inconveniencing and influencing those attempting to do business with White Oak. The case of *Local 761, International Union of Electrical, etc. Workers* v. *NLRB*, 366 U.S. 667, was relied on as authority for this proposition. In the original brief the argument was stated this way:

> "The incident regarding Dockery and West occurred at the entrance to the Anthras tipple where four or five White Oak employees worked, thus such activity could only be 'primary' and not 'secondary'. The object of the picketing obviously was directed at White Oak and not Snyder Coal Co. Indeed the record does not disclose that the so-called pickets even knew or could know that Dockery and West did not work for White Oak. In any event, to hold such activity unlawful would be 'a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's every day operations'. *Local 761*, at page 681."

Respondent's brief pointed out that at the time the trucks were stopped at a highway intersection some several miles from the White Oak tipple (R. 202, 519-520), no effort was being made to stop the tipple operation because the UMW contract was not scheduled to expire until the end of the week. It was in this connection that the Court of Appeals noticed that there was no primary dispute at this first time that the secondary employees were interfered with; although elsewhere in the opinion it was stated that Arnold of White Oak had told UMW representatives, Prater and Daniel, that he could not sign the amended wage agreement and had announced his intention to operate without a UMW contract after its expiration. By petition to rehear, UMW argued that if the Court of Appeals was indicating that there was no primary dispute there could be no secondary activity. In connection with this stopping of trucks of other employers it was again argued:

> "This was 'primary' picketing declared permissible in *Local 761, Int'l Union of Electrical Workers* v. *NLRB*, 366 U.S. 667. Pickets are not required to trespass on the employer's property to keep picketing in the primary category."

and

> "Though this Court herein has had its attention called to *Local 761*, and UMW has urged in this case, as it did in the *Flame* and *Sunfire* cases (which the Court has cited in its opinion) that *Local 761* rejected the charge of a secondary boycott, this Court has consistently failed to explain why the Court is of the belief that that case is inapplicable."

In response evidently to this argument the change was made by the Court of Appeals in the one sentence of its opinion as follows:

> "It is to be noted that the secondary employees were first interfered with before mining operations under the bargaining contract came to an end and before the start of any nearby primary picketing activity, of which the first interference could be considered an incidental and permissible part. Cf. *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *N.L.R.B.*, 366 U.S. 667."

Local 761 deals with the question of when picketing activity of certain types and at certain locations *concurrent* with lawful primary activity constitutes a violation of the secondary boycott provisions of the Labor Management Relations Act, the literal language of which is not to be construed too broadly. Thus if there is no picketing of the primary employer at the time the persons seeking to do business with the primary employer are interfered with, then, of course, the doctrine of *Local 761* is not significant. How the above quoted sentence of the Court of Appeals can be construed otherwise is not understandable.

Petitioner argues that previous decisions of the Court of Appeals, although not following "the teachings of this Court", did not "encompass the spectacular violence theory" and that therefore the instant case "represents a broad expansion of the secondary boycott provisions". Of course the very phrase "spectacular violence" was quoted from the *Flame* case and the language of the holding of the Court of Appeals in this case is almost exactly that of the *Osborne* case. Petitioner means, perhaps, that in the previous cases

the violence was not the only evidence of secondary boycott. As hereinabove pointed out, the violence was certainly not the only union activity in this case in violation of the secondary boycott provision of the Federal Act.

Petitioner also says that the decision of the Court of Appeals "ignores the decisions of this Court that primary activities are protected by the Act" and that there are needed "a greater clarification as to what are permissible acts under Section 303" and "evidentiary guide lines". There could hardly be imagined a case less worthy of this Court's attention to the clarification of the lines of demarcation between legal and illegal picketing, coercion and persuasion. The only UMW activity even arguably legal, protected or permissible was that directed at the primary employees, those working for the coal operators; and it was this that the National Labor Relations Board, upon charges filed by White Oak and others, found to be in violation of Section 8(b)(1)(a) and enjoined under Section 10(j) of the National Labor Relations Act (R. 79, 92). On April 30, 1959, UMW was, by order of the United States District Court for the Eastern District of Kentucky, enjoined from, among other things, mass picketing, blocking roads or other entrances to mines, or in any other manner restraining or coercing employees in the coal industry or other employees in the exercise of their rights to self organization (R. 92). Dynamite and shooting from ambush turned out to be just as effective, but the obviously more remote relationship to the ordinary violations of Section 303 presents to this Court no reason for an elaboration of the difference between lawful primary activity and an unlawful secondary boycott.

QUESTION NO. 2

The Damages to the Business and Property of White Oak Were Not the Result of a Strike or Any Other Voluntary Conduct on the Part of Its Employees Who Were Members of UMW But Were Caused by the Wrongful Acts of UMW and of Persons for Whom It Was Legally Responsible

The second question presented by the petition is that responsibility was imposed upon UMW "necessarily" on the basis of "the conduct of union members or of unknown persons and not that of agents or employees of the union and not authorized, participated in or ratified by the union". This was not the theory of liability of the international union pleaded and proved by the plaintiff and was certainly not charged as such in the District Court's instructions to the jury. It is a factual contention of UMW rejected by the jury under careful instructions as to matters of agency and concert of action (R. 715-717).

The argument under this question is prefaced with the complaint that the District Court submitted to the jury and the Court of Appeals approved "the legal proposition that if an employer suffers damages resulting from a strike of his employees and there occurs during the course of this strike unlawful conduct the guilty party becomes liable for all damages resulting from the legal conduct and the illegal conduct". The relationship of this proposition to the question presented is not readily understandable, and the obscurity of reasoning is not relieved in the argument of UMW by reference to any particular part of the District Court's instructions to the jury or holding of the Court of Appeals. It is assumed that the point of the argument is that the employer has recovered damages on account of a legal strike of its employees attended by

some unlawful activity on the part of persons not connected with UMW.

It was a principal contention of UMW that White Oak's employees voluntarily went on strike because their employer refused to sign its amended National Bituminous Coal Wage Agreement. As expressed in the Order Pursuant to Pretrial, UMW contended that "The closure of plaintiff's mine in March, 1959, resulted from the voluntary cessation of work on the part of plaintiff's employees who were members of defendant union and who ceased work for a lawful purpose" (R. 24). Primary reliance as a matter of evidence was placed upon the result of an election among White Oak employees petitioned for by a rival union and held in August, 1959, in which UMW received a majority of the votes. The rights of the defendant with respect to this theory were carefully explained in the instructions to the jury as follows:

> "A union has the right under state law to induce employees by fair persuasion to withhold their services from an employer in order to obtain a collective bargaining agreement.
>
> "By fair persuasion is meant argument, exhortation or entreaty addressed to a person without threat of physical harm.
>
> "A union has the right under state and federal law to induce employees to leave their work and to remain away from their work by paying or by giving such employees strike benefits or other moneys or things of value.
>
> "A union has the right under state and federal law to peacefully picket an employer's premises in order to induce other persons to cease doing business with the employer and to thereby obtain a collective bargaining agreement." (R. 714-715)

This theory of UMW that White Oak's troubles were caused by a voluntary "strike" on the part of its employees is the subject of several adverse comments on the evidence contained on pages 7, 8, 9, and 12 of UMW's petition under "Statement of the Case," and they should be herein noticed.

First, the "confusion" declared by UMW about whether White Oak and its employees intended to work on the morning of March 16, the day after the UMW contract expired, was testified to only by UMW witness James Tidwell, President of the White Oak Local, who said he heard on the radio and saw in the newspaper that White Oak intended to work but claimed that he understood they were to do only painting and repair work (R. 551). Other testimony was to the contrary (R. 346, 410, 406, 378, 381, 355).

The UMW claim that the motorcade which was organized by Prater at a road intersection on White Oak Mountain on the morning of March 16, stopped at White Oak's stripping operation a little while later only because it "missed a turn" in the road is incredible in view of other testimony about what they were up to. "They came back and give me my instructions . . .", testified superintendent Hemsworth (R. 356). "They told us if we wanted to do any painting or repair work, we could do that but not prepare to move any coal", said employee Hatmaker (R. 379-380). They "told the foreman what we could do and what we couldn't do", said employee Carl McNeely (R. 410). No excuse about missing a turn or anything else was given for the same motorcade having stopped later that day at another coal stripping operation and causing it to shut down, telling the foreman that they had already stopped "one of the Ules Arnold's jobs" (R. 326-327).

UMW's statement that most of "the employees and truck drivers testified they had not been asked to return to work" is misleading, the many citations to the record being mostly the testimony of their truck driver witnesses who would not have been contacted directly, but through their employer, and a couple of tipple employees who would not have been needed until after the production employees resumed work. On the other hand, all six former White Oak employees who were asked about the subject testified that they were afraid to work. One of these was a witness for UMW (R. 518).

The Court of Appeals was also criticized for mentioning the "undisputed" evidence that the rival Southern Labor Union had a "reputation as a company-sponsored union". The reference is to the testimony of Prater. UMW witness Tidwell and another former employee of White Oak who had been fired, also testified that Arnold and foreman Hemsworth had shown them a proposed contract with the rival union and tried to interest them in membership. This was categorically denied by both Arnold and Hemsworth (R. 694, 697). Arnold, when cross-examined about whether he had asked a number of his employees to join the rival union, testified that when the men asked him about it he told them he "wasn't allowed to talk to them" and that he "understood (he) didn't have the right to take any part in it" (R. 132).

The last UMW comment on this holding of the Court of Appeals against UMW's contention that the work stoppage was caused by a voluntary strike, is that the Court adopted Arnold's words and "found circumstantial weight in its conclusion that White Oak's employees were 'well satisfied' with their wages and

that, prior to the strike, they did not 'complain' about expiration of the UMW contract". This paragraph in the petition, page 12, ends with the citation to the record of Arnold's testimony, and so does the record in this case about this matter. While several witnesses testified that they were willing to work without a contract, UMW did not undertake to prove by anybody that he was dissatisfied with his wages and working conditions.

It was the theory of White Oak that the work stoppage was caused not by voluntary adherence to UMW by the mining employees, but by fear, illegally induced, that the Union would prevent them by any means necessary from working other than under the National Bituminous Coal Wage Agreement. This fear continued until the time notices were posted by order of the National Labor Relations Board that unlawful interferences with them on the part of the UMW would cease. The evidence was clear from the testimony of the employees themselves, including the only one of defendant's witnesses of whom they inquired about the matter, that the employees quit work and stayed away from work because they were scared of the UMW (R. 205, 331, 347, 395, 406).

In its argument of this Question UMW undertakes to reclassify and restate on pages 23-25 of the petition some of the evidence recited in the opinion of the Court of Appeals. In the case of three of these six items there are certain comments in parenthesis, all of which are untrue or misleading in the light of the record in this case.

Under paragraph numbered 2 on pages 23 and 24 of the petition, UMW mentions a time lapse of three months between certain events. The same point is

mentioned on page 12 of the petition under "Issues". Concerning the connection of UMW Representatives Prater and Daniel with the Jellico tipple destroyed by dynamite on May 6, 1956, the Court of Appeals pointed out that "they were down at the tipples at Jellico about midnight prior to the dynamiting of the Randolph property and referred to the dumping of coal across the sidewalk close to the "Randolph ramp" (A. 12-13). While these facilities at Jellico were used in the preparation and loading of the coal produced by the witness Randolph's Snyder & Randolph Coal Company, they were owned by Gilchrist & Sons and also used for coal produced by its affiliated G & R operation. It is obvious that this paragraph in the opinion referred to dynamiting of the Jellico ramp, tipple and property and not the later destruction of an auger in Whitley County owned by Snyder & Randolph.

The record shows, that within a day or two of the dumping of the Snyder & Randolph coal at the Gilchrist tipple in the presence of Prater and Daniel about midnight March 9th the G & R and Snyder & Randolph mines ceased work under the union pressure and the Jellico tipples were not used again until Snyder & Randolph resumed trucking coal into Jellico three days before the tipples were destroyed by dynamite on May 6th (A. 7, R. 477-8, 220). UMW Field Representative Daniel had told Randolph in March that there would be no more coal loaded over that ramp (R. 219). There was a definite continuity of interference and no lapse of three months as petitioner interpolates. The other parenthetical comment under item 2 is that "a strike was on among Gilchrist's employees at the tipples". This is not true.

Under item 3 concerned with the activity of Prater and Daniel the morning the Gilchrist tipples were blown up, UMW says, "The record is silent as to whether any members were arrested or whether there was any further disposition of the case". This is also not true. UMW member, pensioner and witness, James A. Elliott, testified that he was arrested for this dynamiting on the morning of the occurrence (R. 626). His alibi for the evening was that he was staying all night "up at Branum Hill . . . with a Chambers girl" who "died here a while back" (R. 627).

In item 5 with reference to the status of Hubert Bailey and four other men, petitioner states in parenthesis: "Circuit Court did not refer to fact that these members supervised for their local union the disbursement of $25.00 a week grocery orders to those on strike in the area (R. 460-462, 465)." The record reference is to the testimony of Prater about Bailey, and not about any of the other four, evidently in explanation of the fact that plaintiff's witnesses had testified that UMW funds were used to pay for Bailey's meals and gasoline. The activities of Bailey and the other members of the "overall gang" mentioned were, however, described as much more menacing by plaintiff's witnesses Malcolm Jackson (R. 159-160), Trooper Harold West (R. 167), James Veach (R. 193), Y. B. Stanford (R. 255) and Dave Smitty (R. 369-370). Bailey, Cox, the Bryants and Justice were not among the thirty-four witnesses whose testimony was presented by the UMW.

UMW comments under its statement of facts on page 13 of the petition that the Court of Appeals, in referring to Bailey's statement about the union furnishing them dynamite and Arnold not going back to work,

did not point out that the statement was made "wholly out of context with" the labor dispute. Actually the witness said that he had "brought the subject up about the union" and "how they had been threatening" a man who worked for a little coal mine owned by his father and that it was during this conversation that one of the other men said he had "heard Arnold is going back to work". In addition to Hubert Bailey's threatening statement about Arnold, one of the other men said that he did not like the way a certain man had been talking about the union and that he was going to shoot his windows out that night. The next day the witness noticed that this man's windows had been shot out (R. 193-194). The statements were, therefore, not idle conversation unconnected with the labor dispute.

The legal argument of the petitioner centers upon Section 6 of the Norris-La Guardia Act and the holding of the Court in *Brotherhood of Carpenters and Joiners of America* v. *U. S.*, 330 U.S. 395, and various items of circumstantial evidence are presented as insufficient under the applicable rule. It is argued that the *Brotherhood of Carpenters* case precludes union responsibility "for conduct except upon *clear proof* that it actually authorized, participated in or ratified the specified illegal conduct". This Court, however, said in that case:

> "There is no implication in what we have said that an association or organization in circumstances covered by § 6 must give explicit authority to its officers or agents to violate in a labor controversy the Sherman Act or any other law or to give antecedent approval to any act that its officers may do . . . The grant of authority to an officer of a union to negotiate agreements with em-

> ployers regarding hours, wages, and working conditions may well be sufficient to make the union liable . . . And the custom or traditional practice of a particular union can also be a source of actual authorization of an officer to act for and bind the union." 330 U.S. 409-410

In the last part of the argument under this question, petitioner characterizes the evidence in the record pertaining to its liability as an "alternative suspicion", the other suspicion being that the coal company "hard pressed for funds caused by the strike destroyed the equipment to collect the insurance" and evidently inspired some of the other acts that caused its damage. On cross-examination of U. R. Arnold, White Oak's President, UMW elicited testimony that Sheriff Rose Kitts of Campbell County, who appeared on the scene of the dynamiting during the following afternoon had told him that he had a lead on a yellow Cadillac that was seen in the vicinity of the dynamiting the night before and further that Arnold, himself, drove the only Cadillac in the immediate vicinity (R. 128). Arnold also testified on cross-examination that the insurance policy on the equipment that was destroyed had been obtained not "too long" before, but he explained that the Company which had carried the insurance for "quite a while" had cancelled White Oak's coverage and that of other companies because of the "dynamiting and goings on around", and he had obtained such other insurance coverage as he could (R. 129). He had testified on direct examination that he had some insurance but that the insurance company refused to pay the claim for the dynamiting of the equipment. An objection was sustained to a question as to why no payment was made (R. 97). Plaintiff's later witnesses, Highway Patrolman, Bunch, and

Bauer, an agent of the Tennessee Bureau of Criminal Identification, were asked on direct examination about Sheriff Kitts' report on the yellow Cadillac. Trooper Bunch did not seem to know anything except what Sheriff Kitts had told him which was objected to as hearsay, and agent Bauer said that he had followed up the lead as best he could and found a yellow Cadillac parked in front of UMW headquarters in Middlesboro and photographed it on one of three occasions that he saw it there (R. 236). He said it was registered in the name of a Kentucky mine operator. With the record in this shape at the close of the plaintiff's proof as to the Cadillac and the insurance, UMW failed to call Sheriff Kitts as a witness or even bring up either subject again. In the end, there was nothing much of this alternative theory of responsibility for plaintiff's damages for speculation much less for legal consideration.

Reference has been previously made to the fact that the so-called primary activity of the union—coercion of employees in the coal industry—was enjoined by a United States District Court upon the petition of the National Labor Relations Board. It should also be stated in connection with the claim of UMW that it has been held liable without legal precedence for the consequences of both legal and illegal activity that the motorcades could be and probably were found by the jury to be in violation of Tennessee Code, Section 39-2805, making it a criminal offense to "willfully prowl or travel . . . through the country or towns, to the disturbance of the peace . . . or for the purpose of causing, through threats or intimidation or other improper means, any citizen . . . to do or not to do any lawful thing . . ."; and that the stopping of trucks by crowds of pickets was within the prohibition of Section 39-

2303 forbidding any person to obstruct a public or private highway. There was no "interplay of lawful" acts concerning which the union is left to "guess at" its rights and liabilities. The concern of UMW for the shades of difference between lawful and unlawful conduct was not evident in 1959 in Campbell County, Tennessee.

QUESTION NO. 3

The Claim for Violation of the Law of the State of Tennessee Based Upon Wrongful Conduct Also in Violation of Section 303 of the Labor Management Relations Act Is Not Displaced by the Pre-eminence of the National Labor Relations Board and the Federal Law

Under Question 3, the petitioner make a most peculiar argument that "the principles of federal preemption" preclude the federal courts from adjudicating the claim for damages under the state law since "the activity of the subject matter of" this litigation is arguably subject to the protection or prohibition of the National Labor Relations Act. Cases relied on are *Iron Workers Local 207* v. *Perko*, 373 U.S. 701 (1963); *Association of Journeymen* v. *Borden*, 373 U.S. 390 (1963); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); and *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957).

Borden and *Perko* considered actions by union members allegedly wrongly dealt with by their unions.

In *Borden* this Court said:

> "We need not and should not now consider whether the petitioner's activity in this case was federally protected or prohibited, on any of the theories suggested above or on some different basis. It is sufficient for present purposes to find, as we do, that it is reasonably 'arguable' that the matter comes within the Board's jurisdiction".

In *Perko* there was a similar conclusion:

> "It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor practices. We, therefore, conclude that the State must yield jurisdiction and the judgment below must be Reversed."

In the *Garmon* case, of course, the question was whether the California Court had the right to award damages arising out of peaceful picketing activities. It was pointed out that the obligation to pay compensation can be a potent method of controlling policy and governing conduct and that the state must yield to "the primary jurisdiction" of the National Labor Relations Board.

The holding was summarized as follows:

> "Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced."

In *Youngdahl* this court held that the courts of Arkansas had the discretionary power to enjoin future acts of violence, intimidation and threats connected with picketing activity but could not so enjoin peaceful picketing, saying:

> "Though the state court was within its discretionary power in enjoining future acts of violence, intimidation, and threats of violence by the strikers and the union, yet it is equally clear that such court entered the pre-empted domain of the

National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners."

Thus, the doctrine of pre-emption announced in these cases applies to matters such as unfair labor practices which are arguably within the exclusive jurisdiction of the National Labor Relations Board. Relying on these cases, the petitioner insists that the claim for damages in this case based upon violation of state law must yield to the exclusive jurisdiction of the National Labor Relations Board, even though Congress has provided by Section 303 of the Labor Management Relations Act a remedy independent of the Board for substantially the same activity. There is no legal authority or logical basis for such an argument. In previous petitions for certiorari in several similar cases from the Sixth Circuit which are cited in its opinion, UMW has urged, without authority or success, that the federal cause of action for damages supplanted and displaced the claim under state law. Since the denial of the petitions in those cases, this Court in *Smith* v. *Evening News Association*, 371 U.S. 195, held that a suit could be maintained in a Michigan court by an employee against his union for violation of a collective bargaining agreement which was concededly, not merely arguably, an unfair labor practice within the jurisdiction of the NLRB. There was, of course, precedent for this decision in previous opinions dealing with Section 301 of the Labor Management Relations Act. The similarity in this respect of actions under Section 303 such as the instant case and under Section 301 is recognized in a footnote in the *Borden* case and it was there noted that principles different from those announced in *Garmon* were applicable thereto.

Under this question petitioner also relies upon *Morton* v. *Local 20 Teamsters, etc.* 320 F. 2d 505, decided by the Sixth Circuit after this case, and involving also a suit for damages based on a secondary boycott unlawful under Section 303 "as well as being unlawful under the common law of the State of Ohio". In this connection the Court of Appeals is criticized for allowing the claim under state law even though the picketing was peaceful. Whatever might be the real or imagined conflict of this result with the rule in the *Garmon* case, it has nothing to do with the instant case. Although UMW claimed that in all things involving White Oak it was peaceably protecting the interests of its membership, it was respondent's theory, pleaded and proved, that its damages resulted from threats, intimidation and violence. The jury was told by the District Court, in part:

> "You may not find the defendant liable to the plaintiff under the state law unless you find that the defendant engaged in acts of violence in breach of the peace relative to plaintiff's mine and that such conduct damaged plaintiff's property or business, or both." (R. 714)

Thirdly, in answer to the petitioner's vague and superficial argument on this subject, it should be pointed out again that the matters out of which this action arose were, indeed, "left in the first instance to the National Labor Relations Board" as might be required under the *Garmon* principles in other situations; and it cannot be said of this case that the Board "has not adjudicated the status of the conduct" complained of. On the 26th day of March, the month in which the trouble first arose, White Oak and others filed unfair labor practices with the National Labor

Relations Board against UMW (R. 79). On April 30, after due investigation, upon petition of the Regional Director, Ninth Region of the National Labor Relations Board, a temporary restraining order was issued by the U. S. District Court for the Eastern District of Kentucky enjoining District 19 of UMWA and UMWA in the area including White Oak from mass picketing, blocking roads, intimidating and in any other manner restraining or coercing employees in the exercise of their rights (R. 92). This proceeding ended in March of the following year by the posting of notices by the UMW under an enforcement order of the Sixth Circuit in the NLRB proceedings which was dealt with at some length in the opinion of the Court of Appeals in this case. Of course, it is specifically provided by the Labor Management Relations Act that both the courts and the Board shall have jurisdiction over acts which amount to a secondary boycott. Moreover, if, in the words of the *Evening News Association* case, there may be "situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice", this case is certainly not one of these situations.

QUESTION NO. 4

Under the Doctrine of Pendent Jurisdiction the District Court Was Empowered to Entertain the Claim for Violation of the Law of the State of Tennessee Along With the Claim for Damages Under the Labor Management Relations Act

The fourth question set forth in the petition embraces the familiar argument against the application of the doctrine of pendent jurisdiction which UMW insists was not properly disposed of by the Circuit Court of Appeals. The Sixth Circuit has written on

this subject in *United Mine Workers of America* v. *Meadow Creek Coal Company*, 263 F. 2d 52 (C.A. 6) (cert. denied 359 U.S. 1013); *United Mine Workers of America* v. *Osborne Mining Company*, 279 F. 2d 716 (C.A. 6) (cert. denied 364 U.S. 881); and in *Flame Coal Company* v. *United Mine Workers of America*, 303 F. 2d 39 (C.A. 6) (cert denied 371 U.S. 891), and the matter has been extensively briefed on petitions for certiorari to this court in those cases and in the case of *Gilchrist* v. *United Mine Workers of America*, 290 F. 2d 36 (C.A. 6) (cert. denied 368 U.S. 875).

As stated in its brief in the Court of Appeals, UMW has attempted to confront the injured parties in these cases with "an unanswerable dilemma: If the two causes of action are based upon the same facts, then the Federal Law has pre-empted the field and thereby the State cause of action must fall. If they are not based upon the same facts, then the District Court did not have jurisdiction over the State cause of action". If the facts of this case were as set forth by the petitioner under this and other headings, the case of the respondent would have failed on much less technical grounds. The truth is that the UMW moved on all fronts against the trucking and mining of coal in the entire area, indiscriminately violating both federal and state law. It was on the highways traveled by the secondary employees that most of the incidents of interference and intimidation occurred.

There should be no question now of the applicability of the doctrine of pendent jurisdiction under the holdings of the previous similar cases and those of this Court. Petitioner has offered nothing new on the subject; there is nothing more to be said.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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